

June 23, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Reference Number: 04-0066

Ms. Davida Craig Celestin
Executive Director
State Office of Minority and Women Business Assistance
Massachusetts Transportation Building
10 Park Plaza, Room 3740
Boston, MA 02116

Dear Ms. Celestin:

This is in response to an appeal of Disadvantaged Business Enterprise (DBE) certification denial concerning Fontana Kitchens. We have carefully reviewed the material from the State Office of Minority and Women Business Assistance ("SOMWBA") and Fontana Kitchens. We have concluded that SOMWBA's decision is inconsistent with the substantive certification requirements of the Department's DBE regulation, 49 C.F.R. Part 26, ("the Regulation"). Specifically, SOMWBA failed to follow the certification procedures specified by the Regulation §26.83. Accordingly, we reverse SOMWBA's decision and direct SOMWBA to certify Fontana Kitchens.

Under the Regulation at §26.83(h), once recipients have certified a DBE, it shall remain certified for a period of at least three years unless and until its certification has been removed in accordance with §26.87. The Regulation at §26.83(j) requires that DBEs provide, on a yearly basis, a sworn affidavit affirming that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements or any other material changes in its application materials. The affidavit should also specifically affirm that the firm continues to meet the SBA business size criteria and the overall gross receipts cap. According to the Regulation at §26.109(c), DBE firms and applicants for DBE certification are required to cooperate fully and promptly with recipient compliance reviews, certification reviews, investigations, and other requests for information. Failure to do so shall be a ground for appropriate action against the party involved (e.g., with respect to DBE firms, denial of certification or removal of eligibility and/or suspension and debarment).

Based upon the record evidence, the following events appear to have occurred.

1. Fontana Kitchens was recertified as a DBE by SOMWBA on July 11, 2001.
2. On March 12, 2002, SOWBA notified the firm that its DBE certification renewal was due and requested a "no change affidavit" and tax returns within 20 days.
3. In May, 2002, SOMWBA's Certification Committee notified the firm that since it did not receive the documents SOMWBA requested in March, 2002, the firm no longer met the requirements of the Department's Regulation and should be

decertified.

4. On July 9, 2002, SOMWBA notified the firm that it no longer met the qualifications of the program and should be decertified.
5. On July 15, 2002, Wendy Beltramini, the disadvantaged business owner, sent a signed affidavit entitled “notice of change” to SOWMBA. Ms. Beltramini stated “About 6 months ago, I changed the DBE name back to Fontana Kitchens. This did not change the Fed I.D. number or involve a name change in the corporation. This did no change anything with ownership. . . .” She also sent an affidavit stating that there have been no changes in the firm affecting its ability to meet size, disadvantaged status, ownership or control requirements.
6. From this point forward, it appears that SOMWBA considered this to be a certification matter. On September 17, 2003, SOMWBA wrote to the firm acknowledging its certification request. SOMWBA requested that the firm submit current résumés of principals and key employees, the last fiscal year financial statement, 2001 and 2002 federal tax returns, the firm’s recent annual report, lease or rental agreements, vehicle registration/titles, a personal financial statement form, a signed and notarized statement of disadvantage, and other documents.
7. On November 19, 2003, Ms. Beltramini wrote to SOMWBA stating that she was unaware that additional paperwork was needed until September 2003; that she faxed SOMWBA documents, and requested that SOMWBA inform her of additional information that it required.
8. On December 3, 2003, Ms. Beltramini wrote to SOMWBA the following: “Enclosed please find what we believe is the missing paperwork originally requested. Since you refused to send a list of only what was missing, we are sending you what we believe to be missing. . . . Please notify us as soon as possible if there is anything else missing or if we are granted re-certification.”
9. A certification investigator’s report dated December 4, 2003, states that the firm failed to cooperate as defined by the local statute, 425 CMR 2.00. That same day, SOMWBA thereafter denied Fontana Kitchen certification when it informed the firm in writing that because of its failure to submit required documentation, the firm was no longer eligible for certification and should be denied certification under the Department’s Regulation. SOMWBA sent the firm a letter also dated December 4, 2003, informing it that was late in submitting information for the state WBE program as part of its 6 year substantive review of the firm’s eligibility.

Clearly, the procedures specified under the Regulation were not followed in this instance. The firm’s certification had not expired since it was certified in July, 2001. Since the firm was already certified, it needed to submit a no-change affidavit in July, 2002, not March, 2002. The July 9, 2002, decertification action initiated because of non-submission of the required documents was therefore premature. Although the firm appears to have not responded to SOMWBA’s deadline it set in its March 2002 request, it did do so on July 15, 2002 when the firm submitted its affidavits. This is a mere four days beyond the firm’s certification anniversary

date of July 11, 2002. (The Department notes that pursuant to the Regulation §26.83(i), Ms. Beltramini should have notified SOMWBA within 30 days of changing the firm's name, instead of waiting until July 15, 2002, six months after this occurrence.)

Both the applicant firm and SOMWBA appear to be confused over the substantive requirements of the Department's program. If SOMWBA indeed considered the firm to be applying for certification rather than renewal in September, 2003, it should have followed the procedures in the Regulation §26.83, which calls for a site-visit and a complete application, among other items. SOMWBA does not appear to have fully initiated this process in its September, 2003, request since it asked only for limited information which would clearly not be enough to certify the firm if SOMWBA had been following the procedures correctly. Ms. Beltramini stated in the firm's February 5, 2004, appeal letter:

I was initially certified by Sondra Smith [of OMWBA]. I have been re-certified every two years since then. This year however, I have been decertified. Ms. Smith claims that she did not receive all my paperwork on time. Somehow I did not receive the notice until mid September. As I solely run this business I was a little tardy in getting this information sent in. I did send it in sometime in October. Apparently I was missing some information. Ms. Smith called and left a message. I sent her a letter by mail and by fax on November 19. . . . She refused to tell me what was missing or what she needed to complete my recertification. . . . On December 3, we faxed Ms. Smith what I believed was missing.

Based on the record evidence, it appears the SOMWBA's Certification Committee and the applicant do not understand the timelines specified under the Department's Regulation and the differences it that may exist between the Regulation and the state program. The result of this confusion is that the firm was denied certification which seems too harsh a remedy for a mistake originated by SOMWBA.

SOMWBA may initiate decertification proceedings in this matter after proper notification is given to the firm as specified under the Regulation §26.87. At that point, SOMWBA can determine whether the firm meets the qualification standards of the Regulation. If SOMWBA determines that the firm does not meet the requirements of 49 CFR Part 26, the firm should be afforded an opportunity for a hearing. The firm should be given appeal rights to file with the Department.

Thank you for your continued cooperation.

Sincerely,

Original Signed By

Joseph E. Austin, Chief
External Policy and Program Development Division
Departmental Office of Civil Rights